89-327

No. 88-2515

In The

Supreme Court of the United States

October Term, 1989

LUCAS, ET AL

Petitioners,

vs.

LLOYD'S LEASING, ET AL

Respondents,

vs.

CONOCO, INC.

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE GALVESTON BAY FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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17 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF AMICUS CURIAE[1]

This Brief is submitted on behalf of the Galveston Bay Foundation which believes that, within the context of a massive oil spill, owners and operators of oil tankers owe a general duty of care to people and property on the affected shore, without regard to whether such owners and operators are able to predict with certainty where the oil spill will ultimately wash ashore. The Galveston Bay Foundation was formed to "ensure there is a resource" called Galveston Bay. The Galveston Bay estuarine complex exhibits fabulous natural productivity, including 75% of Texas oysters, 33% of Texas shrimp and 50% of Texas saltwater recreational fishing. Galveston Bay is also home to approximately 30% of United States refining capacity and almost 50% of U.S. chemical production.

Oil and chemical products from these industries are transported via the Houston Ship Channel down the 50 mile length of Galveston Bay to deep water. Any spill from this transportation activity would directly affect the

[1] The Galveston Bay Foundation wishes to express its sincerest appreciation to the University of Houston Law Center, David Duncan, Assistant Director, Environmental Liability Law Program, Ms. Linda Keng, and Associate Professor Barbara White, of the Law Center for their support in the preparation of this amicus curiae brief.

$300 million annual income from commercial fishing and Bayshore recreation.

Perhaps more than any estuary in the United States, the Galveston Bay system epitomizes the tenuous balance between urban/industrial development and natural productivity. The livelihood of the people surviving on the Bay – the fishermen, the naturalist guides, the sporting goods salesmen, the moteliers and the restauranteurs – depends upon the maintenance of the balance.

To insure the maintenance of balance, one economic activity cannot be allowed to dominate another. Responsible behavior should be encouraged and harmful activity dissuaded; on Galveston Bay, a major oil or chemical spill could destroy our tenuous balance and wipe out a $300 million per year economy. Our legal system should encourage the maintenance of balance, particularly given our potential to destroy.

The Galveston Bay Foundation is submitting this amicus brief – our first – because we feel the circuit court's decision threatens our tenuous balance on Galveston Bay. Irresponsible behavior is rewarded by this decision and economic dominance is given to one industry at the expense of another. To maintain Galveston Bay, responsible behavior and balance must be encouraged. In the instant case, these principles require holding the shipping industry fully responsible for the harms to recreational property owners for damages arising from an oil spill.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that people and property on the shore are not within the foreseeable zone of danger of an oil spill and thus entitled to compensation from oil tanker owners and operators who caused that spill. Such a holding rests on the false premise that oil tanker owners and operators must be able to predict with certainty the precise location where an oil spill will wash ashore before any harm caused thereby is deemed foreseeable. The inherent unpredictability of currents, winds, and tides renders such a prediction impossible and thereby exonerates the shipping industry from responsibility for massive oil spills.

Secondly, summary judgment procedures are inappropriate in complex matters of far-flung public import. This Court has repeatedly cautioned against summary disposition of matters with wide ranging legal and economic consequences based solely on affidavits and briefs. Genuine issues of material fact exist in the case at bar. Additionally, undisputed damages to individual property interests and significant harm to the environment occurred. It is unwise, as a matter of sound public policy, to allow an action with far reaching individual and environmental consequences to be summarily dismissed pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Finally, as a matter of public policy, the shipping industry cannot be allowed to disturb our nation's major environmental resources and ecosystems without bearing any of the corresponding costs. To allow gross incursions and disturbance of delicate environmental ecosystems without requiring the tort feasor to bear its associated

cost will cause a chilling effect on industry research and development efforts to prevent such environmental disasters. Economic responsibility for damage caused by tortious acts must be maintained in order to encourage research efforts in the area of preventative oil spill measures. Shipping industry economic responsibility is essential to maintaining the environmental dignity of waterways and natural water systems, perhaps even irrespective of fault.

ARGUMENT

THE CIRCUIT COURT'S NEW FORESEEABILITY STANDARD RESULTS IN A FAR REACHING EXONERATION OF THE SHIPPING INDUSTRY FROM DAMAGE CAUSED BY MASSIVE OIL SPILLS WHERE OIL TANKER OWNER/OPERATORS ARE UNABLE TO PREDICT EXACT LANDFALL OF SPILLED OIL.

The court of appeals determined in this case that its rationale in *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987) is controlling insofar as the people and property owners on shore are unforeseeable plaintiffs. Furthermore, it held that a summary judgment ruling on such a matter of far reaching import is proper. Each contention is wrong.

The circuit court previously enunciated its standard of foreseeability in *Consolidated, supra,* that:

> harm . . . (is) . . . foreseeable . . . if harm of a *general* sort to persons of a *general* class might

> have been anticipated by a reasonably thoughtful person as a probable result of the act or omission, *considering the interplay of natural forces* and likely *human intervention*.[2]

However, in contrast to the *Consolidated* standard, the circuit court majority ruled that oil spill landfall at Galveston must have been predictable with certainty in order for harm to Galveston plaintiffs to be foreseeable as a matter of law. Thus, the "general class of victims"[3] element enunciated in the *Consolidated* standard is discarded. In its place the circuit court substituted the implied condition of *predictability with certainty*. This new standard severely restricts the universe of potential plaintiffs in massive oil spill disasters. Indeed, whenever massive oil spills occur a substantial distance from a coastline, there could be no redressable harm since ultimate landfall of the oil spill "bullet" would be impossible to predict. Such "far-reaching exoneration of the shipping industry from responsibility"[4] for massive oil spills cannot be permitted.

Indeed, this new standard will have an impact far beyond the circumstances of this case.

The assumption of the circuit court majority that the area of possible landfall of the oil spill could have been any point along the Texas coast, up to 340 miles of coastline to the south and west of the spill[5], has no basis in

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[2] *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 68 (5th Cir. 1987) (emphasis added).

[3] *In re Alvenus*, 868 F.2d 1447, 1449 (5th Cir. 1989).

[4] *Id.* at 1450 (Higginbotham, J., concurring in part and dissenting in part).

[5] *Id.* at 1449.

fact. The court, for instance, assumes that the spill would travel only west, which was the actual direction of dispersion, but was by no means the only direction the oil could have traveled. The court also limits the "foreseeable" area of effect of the spill to the area from the point of the spill to the Texas-Mexico border – why that arbitrary point? The court then uses the randomly assigned range of 340 miles of coastline to justify their conclusion that it was not foreseeable as a matter of law that over two million gallons of oil would make its way to an island a mere 70 statute miles distant. The probability that the oil would make landfall in the "populated area" of *Galveston* is certainly far greater than the probability that it would make landfall in the "populated area" of *Corpus Christi*, which is approximately 175 miles from the spill. The court's statistical analysis does not withstand close scrutiny when the basis of its reasoning is understood.

The majority opinion asserts that five and two-thirds to one is not foreseeable as a matter of law. The probability of the event at issue occurring, differently stated, is 18%. This is too high a probability to preclude claimants from recovery as a matter of law, even if one assumes that the majority's statistical reasoning is correct. Statistical evidence has been used to find foreseeability in a number of cases.[6]

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[6] *Davis v. Wyeth Laboratories*, 399 F.2d 121 (9th Cir. 1968) (foreseeable that injuries would result in polio vaccine use, sufficient to require warning); *United States v. Tex-Tow*, 589 F.2d 1310, 1314-15 (7th Cir. 1978) ("The statistical foreseeability of

(Continued on following page)

However, there is some case precedent, and some scholarly writing, which says that statistical evidence alone is not enough to establish foreseeability. For example: " . . . mathematical probability is not the ultimate test of foreseeability, duty or negligence. . . . Probability of injury is only one of many elements to be evaluated in the duty/breach analysis."[7]

Simplicity is virtue with regard to foreseeability. Complicated mathematical formulations mask a simple concept – namely, that oil, once thrown upon the seas, will go where the wind and current take it, to the detriment of the ultimate recipient. It is, therefore, foreseeable to a vessel operator that spilled oil would come ashore.

THE FIFTH CIRCUIT'S USE OF SUMMARY JUDGMENT PROCEDURES IS REVERSIBLE ERROR

Summary judgment procedures are inappropriate and constitute reversible error for any one of the following reasons:

(Continued from previous page)

an accident is a proper basis on which to affix liability." The circuit court used this language to hold a company liable for an oil spill under the strict liability provisions of the Clean Water Act); *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969) (statistical foreseeability of automobile accidents gave rise to manufacturer's duty to design cars to minimize injury).

[7] *Allen v. United States*, 588 F. Supp. 247, 356 (D. Utah 1984), *rev'd on other grounds* 816 F.2d 1417 (10th Cir. 1987), *cert. denied* 484 U.S. 1004 (1988); "The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train." W. Prosser, *Handbook of the Law of Torts* sec. 32 at 147 (4th ed. 1971).

1) Issues of far-flung public import should not be decided by summary judgment[8]

2) If summary judgment is used, the facts must be considered in a light most beneficial to the non-movant, (i.e. claimants/appellants)[9]

3) Questions of proximate causation are, by their nature, questions of fact and thus inappropriate for summary judgment.[10]

Massive oil spills, such as the Exxon Valdez spill in Alaska and the case at bar (approximately one-third the size of the Alaska spill), are matters of profound and lasting public import. Invariably, these accidents create major consequences for the regional environment, local and regional economies, aesthetics, and the general quality of life for the entire effected region. The massive oil spill, evidenced recently by the Alaska spill and the case at bar, has proved itself one of the most devastating forms of environmental disaster.

This Court and the Fifth Circuit Court of Appeals have repeatedly warned against the usage of summary judgment procedure in cases of this type. Indeed, this

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[8] *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948); *Anderson v. Liberty-Lobby*, 477 U.S. 242, 255 (1986) (which reaffirms the Court's view of the appropriateness of summary judgment in *Silas*); *Arenas v. United States*, 322 U.S. 419, 434 (1944).

[9] *United States v. Diebold*, 369 U.S. 654, 655 (1962).

[10] *Transorient Nav. Co. v. M/S Southwind*, 714 F.2d 1358, 1364 (5th Cir. 1983).

Court has specifically cautioned against summary judgment disposition involving matters of major public concern:

> (S)ummary judgment procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import. . . .
>
> We consider it . . . good judicial administration to withhold decisions of the ultimate questions . . . until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide (emphasis added).[11]

The Fifth Circuit Court of Appeals permitted summary disposition of this matter based solely on the affidavit of appellees and briefs which claim an inability to predict ultimate landfall of the oil spill. Such a finding is contrary to any notion of fair judicial administration and has far reaching public policy implications. Should Exxon be permitted summary judgment in its favor simply by filing an affidavit which concludes that the exact location of ultimate landfall was uncertain? We think not. Likewise appellees should not be absolved of liability on this matter of far-flung public import based solely upon affidavit.

Absolution from potentially massive liability will undoubtedly result in reduced efforts to prevent oil

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[11] *Kennedy v. Silas Mason Co., supra,* at 256-57.

spills. The strongest motivation for increased safety and preventative measures continues to be the prospect of massive liability when an oil spill occurs.

Secondly, it is well settled that summary disposition of a case should only be made where the record is reviewed in a light "most favorable" to the summary judgment non-movant (i.e. appellants).[12] It is manifestly apparent that such a standard of review was not utilized by the circuit court panel.

SOUND PUBLIC POLICY DICTATES THAT THE SHIPPING INDUSTRY BE HELD FULLY ACCOUNTABLE FOR ANY OIL SPILL FOR WHICH IT HAS SOLE RESPONSIBILITY.

The policy has long been recognized that industries undertaking dangerous activities which have some chance of causing very substantial damage to innocent parties should be required to bear the responsibility for such damages when they do occur. The owners of the Alvenus should bear the responsibility for the wreck of that vessel, and the attendant oil spill, which wreaked havoc with hundreds of miles of the Texas coastline in 1984. Internalization of costs has been given as one of the fundamental bases of tort law. The social costs of an enterprise should be attributed to that enterprise, such that the true costs of its products are reflected in the marketplace.[13] It may also be said that the owners are the "cheapest cost avoiders" and are therefore in the best

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[12] *Porter v. Califano*, 592 F.2d 770, 778 (5th Cir. 1979).

[13] Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 Harv. L. Rev. 713, 716 (1965).

position to compensate within the framework of the marketplace for the tremendous damages caused by their enterprise.[14]

If the circuit court's reasoning is allowed to control the case, some claimants who are seeking redress for actual damages to property such as boats[15] will be precluded from recovery, since the circuit court majority has basically stated that it was not foreseeable that the oil spill would make landfall in the Galveston area. It seems ridiculous to preclude such claimants from recovery based on foreseeability, but the circuit court's opinion would do just that.

The Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act") provide for strict liability in cases of "discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."[16] Congress explicitly provided for "causation based" liability under the provisions of the Clean Water Act, realizing that some operators would be saddled with liability even when they were not "at fault."[17] Although the statute only allows for the recovery

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[14] Calabresi and Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1060 (1972).

[15] 697 F.Supp. 289, 291 (S.D. Tex. 1988).

[16] 33 U.S.C. sec. 1321(b)(1).

[17] 33 U.S.C. sec. 1321(f)(1), *explained in United States v. West of England Ship Owner's Mutual Protection and Indemnity Association*, 872 F.2d 1192, 1195-97 (5th Cir. 1989).

of costs by the federal government under strict liability, this statute and its legislative intent can be analogized to the case at hand. The intent of the Congress in providing for strict liability for releases into U.S. waters was to assure that spills of oil and other dangerous chemicals would be remedied. In this case, the "tracking" claimants seek only to remedy the damage done to their homes and businesses caused by the negligence of the operators of the Avlenus.

CONCLUSION

Decisions of this Court have long recognized cautionary use of summary judgment procedures, the use of foreseeability/proximate cause standard within a reasonable context, and the overriding public policy concern of protecting our nation's environment. Additionally, this Court has long respected the principle that financial responsibility for torts should be borne completely by the tortfeasors. Public policy dictates that the shipping industry be held fully accountable for all environmental and property damage whenever it causes a massive oil spill. Certiorari should be granted by this court to permit careful consideration of these issues and the lower court's decision should be reversed.

Respectfully submitted,

JAMES B. BLACKBURN, JR.

ANTHONY R. CHASE

Dated: October 20, 1989